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Supreme Court of the United States

OCTOBER TERM 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

THE TRAVELERS INSURANCE CO. and LEVINGSTON SHIPBUILDING CO.,

Respondents.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

AVONDALE SHIPYARDS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT, AVONDALE SHIPYARDS, INC.

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BRIEF FOR THE RESPONDENT, AVONDALE SHIPYARDS, INC.

INTRODUCTION

Basing its opinion on the conceptual ground of the nature of his employment, the court below, following this Court's decision in the *Rohde* case, *infra*, held that the Louisiana Workmen's Compensation Act afforded an exclusive remedy to a new construction worker injured in the course of his employment. The Government seeks re-

versal on the theory that the Longshoremen's and Harbor Workers' Act affords the injured worker an exclusive remedy because of the locale of the accident: over water. Alternatively, it is claimed that the case falls in the "Twilight Zone".

Both of the cases under consideration arose in Louisiana, one in the Eastern District and the other in the Western District. In each case, the Deputy Commissioner held that workers on new construction in shipyards were entitled to the benefits of the Longshoremen's and Harbor Workers' Act to the exclusion of the remedy afforded by the Louisiana State Compensation Act.

By "rare coincidence,"[1] both cases were argued and decided on the same day by the Court of Appeals for the Fifth Circuit. The Government sought *certiorari* in one petition to review both judgments pursuant to this Court's Rule 23(5). Because, however, of there being one issue which is not common to both cases (the question of whether or not in the Avondale case the claimant had made a binding election to take compensation under the State Compensation Act), and because the cases were not consolidated below, separate briefs are being filed on behalf of the separate respondents. This brief will be devoted only to the Avondale case.

Avondale accepts as substantially correct the statement of the case as contained in the Government's brief. Omitted from that statement, however, is the fact that the claim was submitted to the Deputy Commissioner on an agreed Statement of Fact, and that it was stipulated therein that the vessel on which the claimant was working on the date that he sustained his injury was only 57% completed both in man-hours and in dollar value;

[1] Opinion below, R. 43.

that during the entire term of claimant's employment by Avondale, he worked solely on new construction and performed no work on repair jobs; and that all work performed by him was on land except that work which he was performing at the time that he sustained his injury (R. 87, 88).[2]

The Louisiana Workmen's Compensation Act[3] provides compulsory coverage and an exclusive remedy for injuries to all employees engaged in hazardous occupations. New construction of vessels is particularly described as a hazardous occupation. The Louisiana Act is not administered by a Commission, but claims thereunder, if controverted, are made directly in courts of general jurisdiction. No reports or other proceedings are required if the payment of compensation is agreed upon by the employer and the employee.

In the instant case, Avondale commenced the payment of compensation under the Louisiana Act in accordance with its terms, and compensation payments had been made for approximately two years and three months to the claimant at the maximum rate provided for in the Louisiana Act at the time that the claim for compensa-

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[2] Footnotes 24 and 31 on pp. 63 and 75 of the Government's brief are inaccurate. It is implied in the former that there is nothing in the record to indicate that the claimant's contract of employment was different from those of his co-workers insofar as his work on new construction and repair was concerned, and in the latter that the claimant would be required on occasion to engage in repair work. Nothing in the findings supports these statements, and the stipulation of facts is exactly to the contrary as to the latter. (R. 87) The claimant engaged solely and only in new construction work.

[3] Revised Statutes of Louisiana, Title 23:1021 *et seq.* R.S. 23:1035 reads in pertinent part as follows:

> "The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses, and occupations:
>
> "The * * * construction * * * of * * * vessels, boats and other water crafts *(sic)* * * * "

tion under the Federal Act was filed with the Deputy Commissioner. The payments were made by weekly checks which clearly showed on their face that they represented compensation under the State Compensation Act. (R. 89) In addition, Avondale had advanced to the claimant the sum of $3,830.00 upon a plea of financial hardship, such amount to be credited against future compensation payments. Finally Avondale had paid approximately $7,000.00 in medical expenses for account of claimant, although the maximum liability for such expenses under the Louisiana Act amounted only to $2,500.00. In his compensation order, the Deputy Commissioner gave credit to Avondale for the amounts so paid to the same extent as if they had been paid pursuant to an award made by him (R. 93).

At the hearing before the Deputy Commissioner and in the District Court (R. 63), Avondale took the position that by accepting those payments, the claimant had made an irrevocable election of his remedies (in the event that a remedy under the Harbor Workers' Act and a remedy under the State Compensation Act were both available to him), but this point was not reached by the Court of Appeals below for the reason that it held that his sole and exclusive remedy was under the State Act.[4]

In its opinion in the Calbeck-Travelers case, which was the principal opinion below, the Court of Appeals squarely held that new construction work was covered by the State law, that an injury sustained in the course of such employment was excepted from the coverage of the Federal Act by reason of the application of the second condition set forth in Section 3(a) thereof,[5] and that under the facts of the case the "Twilight Zone" doctrine

[4] Opinion below, R. 99.
[5] 33 U.S.C. 903(a).

was not applicable. Accordingly, the respective awards of the Deputy Commissioners as affirmed by the District Courts for the Eastern and Western Districts of Louisiana were set aside.

The matter is now before this Court following the granting of the Government's petition for *certiorari*, limited to the question of whether recovery for injuries sustained by employees working on vessel construction may be afforded under the Longshoremen's and Harbor Workers' Act by reason of such injuries having taken place on the navigable waters of the United States. The question of the finality of the election of remedies made by the claimant in the Avondale case may be beyond the scope of the limited issue presented by the grant of *certiorari*, but obviously enters into the overall picture, and, we submit, should be decided by Your Honors simultaneously with the principal issue involved in the case if it is reached.

ARGUMENT

1.

Coverage under the Longshoremen's and Harbor Workers' Act may be afforded only if recovery for the disability may not validly be provided by the State Workmen's Compensation Law.

The Government for the most part has based its position, we submit, upon a strained interpretation of the judicial and legislative background of the Federal act. To some extent, at least, the same position was urged on the Court of Appeals and was flatly rejected. That Court applied the law as it is written and squarely held that the *situs* of an injury in itself was not determinative of jurisdiction because of the proviso of the Act conditioning such jurisdiction upon the non-availability of a

remedy under the State compensation law. This conclusion is supported by the only two decisions which counsel has been able to find on the precise question presented.

In *Grant Smith-Porter Ship Co. v. Rohde*,[6] which arose prior to the enactment of the Federal act, this Court had presented to it the question of whether or not the Oregon State Compensation Act validly could provide an exclusive remedy to a worker injured on the navigable waters while engaged in construction work on a new vessel. The court held that state compensation was available, because the application of the provisions of a state compensation law under such circumstances

> "would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."[7]

The only other reported case which we have been able to find arose in the Fourth Circuit Court of Appeals in 1933. It is *United States Casualty Company v. Taylor*.[8] In an able opinion rendered by Judge Soper, speaking for a unanimous court (the other two members of which were JJ. Parker and Northcott), it was held that an employee engaged in work on a newly launched but not yet completed vessel had no remedy for compensation under the Federal Act, because his work was not maritime and because the locality of his injury was not the determining feature involved in the claim.

Numerous decisions, of course, have been rendered by this Court and inferior Federal courts to the effect that ship repair work constitutionally could not be cov-

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[6] 257 U.S. 469.
[7] 257 U.S. 469, 476.
[8] 64 F. 2d 521, *cert.* den. 290 U.S. 639.

ered by a State compensation act because of its effect on the uniformity of maritime law. Repair work, of course, may be performed only on a completed vessel, a thing that has taken its place in the stream of commerce. The distinction between repair work and new construction originally drawn in *Rohde* has never, to our knowledge, been changed, and new construction work historically has been considered as purely local and covered by State law regardless of whether the incident occurred on water or on land.

It is our submission that the position which the Government has taken as to the interpretation of the Congressional hearings on the Federal Act, which are labored at length in its brief, is diametrically opposed to the proper and only interpretation that can be drawn from those Hearings and from the wording of the Act itself.

In no place is the tort jurisdictional concept of the Admiralty made the basis of the remedy afforded by the Act. Such a concept is at variance, for example, with subsection (3) of Section 2,[9] which particularly excludes from its coverage

> "any person engaged by the Master to load or unload or repair any small vessel under eighteen tons net."

Moreover, this classification of employee is eliminated from coverage by Section (3),[10] which provides (apparently to make assurance doubly sure) that

> "No compensation shall be payable in respect of the disability or death of—

[9] 33 U.S.C. 902(3).
[10] 33 U.S.C. 903.

> "(1) A master or member of a crew of any vessel, nor any person engaged by the Master to load or unload or repair any small vessel under eighteen tons net;"

We respectfully submit that these two quotations from the clear and unambiguous language of the law adopted by Congress effectively forecloses the interpretation sought to be placed upon the Act by the Government, and completely destroys the thrust of the argument that all parties other than seamen who are engaged in a maritime occupation and who are employed on the navigable waters are covered. Indeed, it is difficult to understand how the Government can state that Congress "intended the Act to cover employees on navigable waters which, although within the 'local concern' doctrine, would also fall within admiralty jurisdiction, and to exclude only those employees which were within the exclusive jurisdiction of the state."[1] On the contrary, the exclusion from the coverage of the Act under Section 2(3), *supra*, of the small claims which are of only local concern negatives in as clear a manner as possible any thought that the Act covers all persons employed on the navigable waters.

The argument of the Government simply has no basis in fact and for the Court to accept that argument, the interpretation of the Act would indeed be most strained. If the intent of Congress was to base jurisdiction on locale, it would have been so simple to have done so! Neither the legislative nor the judicial background of the law prior to its enactment, nor, indeed, the jurisprudence interpreting it subsequent to its enactment, can serve as a basis for the interpretataion that all workers employed on navigable waters have a remedy thereunder.

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[1] Government's brief, p. 46.

This is particularly true when the background in which the law was considered, hereinafter discussed in detail, is known. That background is as follows.

2.

The Legislative and Judicial Background of the Harbor Workers' Act.

Possibly the most criticized and most cited case which has been decided by this Court in the Twentieth Century is *Southern Pacific Company v. Jensen*, 244 U.S. 205. The three-volume Shepard's United States Citator shows 19 columns of citations of cases referring to *Jensen*. Despite all the adverse criticism of the doctrine there set forth, and despite the numerous opportunities available to this Court to reverse it, the decision has stood the test of time. As late as the Court's last term it was again relied upon and cited with approval in *Kossick v. United Fruit Company*, 365 U.S. 731. Moreover, the Government here does not seek to have *Jensen* overruled.

It is strange in the light of this historical fact that such a great portion of the Government's brief should be devoted to the legislative background of the Harbor Workers' Act. That background has been considered time and again,[12] but a review of the Legislative Hearings and the expressions of the persons testifying thereat can only lead to one conclusion: that the Act was adopted to fit the framework set by *Jensen*, which was fresh in the minds of all concerned and which was the touchstone of the law in this area.

No matter what arguments are made relative to Legislative Hearings, even a cursory reading of the Act shows that Congress intended there to be a place in this

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[12] Cf. *Crowell v. Benson*, 285 U.S. 22; *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244; *Davis v. Department of Labor*, 317 U.S. 249.

field for the exclusive operation of the Federal act and another and different place for the exclusive operation of the compensation laws of the various States.

In the interacting areas of the adjudication of the rights of an injured amphibious worker where paramount jurisdiction over remedies is sometimes vested in the States and at other times in the Federal government, even if the legislative background fades into insignificance, the current jurisprudence in no way supports the Government's position as to the exclusiveness of the remedy afforded by the Harbor Worker's Act simply because of an injury being sustained on water.

Although we can cite no statistics to verify this position, it is submitted that it is a fact well known to all practitioners in this field that since the adoption of the law until very recently, the Deputy Commissioners throughout the country have refused to entertain claims involving injuries sustained by new construction workers. The basis of the refusal, of course, was the decision by this court in *Rohde*.

The Harbor Workers' Act was adopted in the light of the decision in *Jensen*, which precluded the application of the remedy afforded by a State compensation act to a longshoreman injured on the water. The case held unconstitutional the application of a State compensation act to such an employee for the reason that under such circumstances, the act would work

> "material prejudice to the characteristic features of the general maritime law, or interferes with the property harmony and uniformity of that law in its international and interstate relations." [13]

[13] 244 U.S. 205, 216.

The decision was rendered in 1917. Shortly before the rendition of the decision, an attack on the workmen's compensation laws just adopted by various states had been before this Court and the compensation acts of New York, Washington and Iowa had been held constitutional. The "liability without fault" theory was comparatively new at that time, and it is not a coincidence that in its contemporary setting, a serious question as to the availability of the remedy provided by the New York law had been raised in *Jensen*. The holding, however, is firm and unequivocal: the constitutionality of a State compensation act could not be maintained in those areas where the general maritime law would be materially prejudiced, but had to be confined to matters of local concern.

Immediately after *Jensen*, *Western Fuel Company v. Garcia*, 257 U.S. 233, reaffirmed the doctrine in a case involving the application of a State wrongful death statute of limitations urged as a defense to a suit in the admiralty, on the theory that the application of that law would not work material prejudice or interfere with the uniformity and harmony of the maritime law in its practical applications.

Between *Western Fuel* and *Jensen* had come *Rohde*, which squarely held that a new construction worker on an uncompleted vessel was engaged in work purely local in character, and hence could be covered by a State compensation act. Numerous other cases came before the Court in those formative years, including *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, and *Washington v. Dawson*, 264 U.S. 219. In both of those cases, this Court struck down separate attempts by Congress to afford compensation recoveries within the admiralty field. Contrarily, it decided *Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, permitting the application of a State

compensation law to an injury sustained by a longshoreman on a dock (as distinguished from a ship), and *Peters v. Veasey*, 251 U.S. 121, reversing the Louisiana Supreme Court (142 La. 1012, 77 So. 948), which had held the Louisiana Compensation Act applicable to a longshoreman injured on board ship.

All of these cases and the judicial background of the problem of the application of State compensation laws to maritime workers were, of course, well known to the Congressional Committees studying the problem, and the rules of law set up by those cases were consciously built into the Longshoremen's Act when it ultimately was adopted.

The legislative history must be considered in the framework of the then existing constitutional theories as announced by this Court. Those theories precluded the application of State compensation acts to maritime workers engaged in maritime activities within the admiralty jurisdiction. It was never considered that the Congress would have the power to adopt a national compensation law applicable to building construction in the various states; such a thought, at least in the 1920's, would have been inconceivable. Therefore, Congress felt that its hands were tied in areas of local concern, and that it constitutionally could adopt a Federal system of compensation only for maritime workers. Thus, the application of the law would not adversely affect or interfere with the harmony and uniformity of the admiralty and the "local concern" doctrine would not be affected.

The position of Congress is shown beyond peradventure by the Senate Report on the Harbor Workers' Act made after the Committee had met.[14] The portion

[14] S. Rept. No. 973, 69th Cong. 1st Sess., pp. 16-17.

of the Committee Report which the Government considers pertinent is quoted at pp. 36 and 37 of the Government's brief, but there has been omitted from the quotation the following most important language which clearly shows the intention of the Congress to enact a law based on the jurisprudence commencing with *Jensen*. The omitted portion of the Report, we submit, gives the *coup de grace* to the Government's argument. The following precedes the first set of asterisks appearing in the quotation on page 37 of the Government's brief:

> "The Committee deems it unnecessary to comment upon the modern change in the relation between employer and employees establishing systems of compensation as distinguished from liability. Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment without regard to negligence on the part of the employer or contributory negligence on the part of the employee. If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this occupation. (*Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149; *Washington v. Dawson & So.*, 264 U.S. 219)."

It is submitted that insofar as the legislative background of the Longshoremen's Act is concerned, it is almost inconceivable to believe that the Congress intended to adopt a law which would afford an exclusive remedy to an employee engaged in purely local employment (which would not affect the overall maritime jurisdic-

tion) simply because he happened to have been working over water at the time that he sustained the injury. Such an interpretation completely reads out of the act the condition that it is to be applied only

> "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

If State law validly can provide such a remedy, it excludes the application of the Harbor Workers' Act under the plain and unequivocal words of the latter act. And for the Government to argue that the Legislative History reveals the intent of Congress to provide coverage under the Longshoremen's Act for all injuries to amphibious workers within the locale of the maritime jurisdiction of the United States[15] is simply attempting to torture the plain words of the Act into a meaning which was never intended and which they cannot have.[16]

Since *Rohde*, State compensation acts have been interpreted as being capable of validly providing for a recovery in cases of new construction workers, regardless of the *situs* of the injury, and, accordingly, the application of the Longshoremen's Act to such situations is foreclosed. The Court of Appeals for the Fifth Circuit so held, and its reasoning in arriving at that result, we submit, is unimpeachable.

As we indicated above, viewed in the light of present day constitutional doctrine, the decisions limiting the scope of the application of Federal law in these areas of

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[15] Government brief, p. 43.

[16] Although "One swallow maketh not summer," at least Senator Smith of Massachusetts agrees with the interpretation we are contending for herein. On August 14, 1961, he introduced in the Senate at the First Session of the 87th Congress S. 2415 in an attempt to extend the coverage of Section 3(a) of the Act to cause it to apply to the construction of vessels.

local concern may very well seem strained and not consonant with this Court's recent theories, now completely accepted, of permitting Congressional action in fields of local concern if interstate commerce is affected. However, we are not here reviewing the propriety of the latter jurisprudence.

The issue here is one of statutory interpretation, not constitutional law. Regardless of the soundness of the constitutional issue decided in *Jensen*, the Congress enacted the Harbor Workers' Act in the light of that case, fitting the law with the condition that it was not to be applied in areas of local concern (such as new ship construction). If, therefore, the law had not been enacted and *Jensen* were to be before the Court today, a contrary result could be reached and State law could be applied in all these cases, making unnecessary any Federal act whatever. That, however, is not the situation. This Court is now called upon simply to interpret an existing statute, one which reads plain and clear, particularly when viewed in the light of the then existing jurisprudence. The argument here propounded is buttressed by the decision in *Motor Boat Sales*, discussed *infra*, p. 18 *et seq.*

No case among the many authorities included in the Government's brief has, to our knowledge, held that a new construction worker is covered by the Federal Act. No confusion exists in this field, and were this decree to be reversed and a recovery granted, the effect on the overall situation would simply be to create confusion where it heretofore has not existed. It is true that numerous cases involving "marine ways" have granted recoveries to employees when ostensibly they were high and dry and well away from the water's edge. These cases, however, of which those cited on p. 66 *et seq.* of the Government's brief are representative, involved the inter-

pretation of the word "dry dock" as that word is used in the jurisdictional clause of the Harbor Workers' Act. In other words, were "dry dock" to be held not to include a "marine railway," the decisions would have reached the opposite result. The Act specifically provides, of course, that compensation is payable if "the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) * * * ."[17]

3.

The Contemporaneous Construction of the Harbor Workers' Act.

The Government argues that the administrative interpretation of the Act is inconclusive, but admits that the only decided case (*United States Casualty Company v. Taylor, supra*) subsequent to the enactment of the Harbor Workers' Act involving injuries to a new construction worker denied jurisdiction of his claim. It is submitted that the Commissioner's Opinion No. 7, quoted in full at pp. 83 and 84 of the Government's brief, together with the lack of any reported case involving this situation, leads inevitably to the conclusion that the administrative determinations made by the various Deputy Commissioners were adverse to the position of the Government here, and that the contemporaneous construction of the Act by the parties charged with its administration uniformly was to decline jurisdiction over claims of new construction workers. Indeed, the feeble attempt by the Government to evade the full thrust of Opinion No. 7 by attempting to have it limited to vessels which were being constructed on "land ways" is completely answered and reduced to empty words by the title of the Opinion, which in fact is a syllabus, reading:

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[17] Section 3, 33 U.S.C. 903.

> "Employees engaged in the construction of a vessel in a dry dock or marine way are not engaged in maritime employment as that term is used in the longshoremen's and harbor workers' act."

Needless to say, all vessels are constructed on ways or docks of some sort. The opinion is not conditioned on the question of whether a marine railway is a dry dock or not: it simply states flatly that new construction work is not within the provisions of the Federal act. It unequivocally recites that the Commissioner's opinion was that employees engaged in new construction are not afforded coverage. Far from being inconclusive, therefore, the very lack of case law shows the complete reliance of the Commissioner's offices and claimants' counsel in this field (possibly the most ingenious and resourceful known to our bar) on the State compensation laws as affording the sole remedy for injuries to employees while engaged in new construction.

The letter from the Director of the Bureau of Employees' Compensation dated January 25, 1962, also quoted in the Government's brief, we submit, seems to have no place therein, since it was not included in the record and is not an exhibit in this case. It is private correspondence, but since the Government cites it an authority and argues *a contrario* from it that the administrative practice is inconclusive, the letter should be commented on at the very least. Apparently it is admitted that the Deputy Commissioner throughout the various Compensation Districts were "guided" by the opinion until approximately 1959. If this Court is to rely to any extent on contemporaneous administrative construction, therefore, it would seem that for 32 years, the Commissioner's offices uniformly held that no jurisdiction existed over claims for new construction workers.

Such uniformity of construction by the officials vested with the administration of a law is not lightly to be cast aside.

4.

The Motor Boat Sales and O'Rourke cases.

Apparently the Government's position that this claim is governed by the Federal act stems from its interpretation of the *Motor Boat Sales*[18] and *O'Rourke*[19] cases. Neither, we submit, can be propounded as an authoritative base on which the Government may stand. *Motor Boat Sales* involved a claim for compensation under the Federal act against a small boat retailer. Although customarily employed as a janitor in his employer's store, the claimant's intestate in the course of his employment went out in a small boat on a trip to demonstrate an outboard motor to a prospective customer. Following his death by drowning, a claim was made before the Deputy Commissioner under the Longshoremen's Act and an award was made following findings that death arose in the scope and course of his employment and that at the time of his death the employee was engaged in maritime employment. On appeal to the District Court, the award was affirmed. It was reversed by the Court of Appeals for the Fourth Circuit, which in turn was reversed by this Court.

The rationale of this Court's decision was, first, that the Court of Appeals had erred in upsetting the finding of the Commissioner, based on competent evidence, to the effect that the decedent was acting in the course of his employment, and, second, that the court below had erred in holding that the employment of the decedent was "so local in character" that Virginia validly could have ap-

[18] *Parker v. Motor Boat Sales Inc.*, 314 U.S. 244.
[19] *Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 34.

plied its own compensation law. On the contrary, Your Honors found that the decedent was clearly engaged in a maritime activity—acting as a lookout on a vessel under way on the navigable waters—and that the language of the Act defining a covered employer as one whose employees were engaged in "maritime employment, in whole or in part, upon the navigable waters * * * ",[20] obviously dictated that coverage should be afforded.

This Court avoided going into the constitutional implications, but accepted them "as the measure by which Congress intended to mark the scope" of the Longshoremen's Act. It simply held that the Act was adopted to provide for Federal compensation in the area which the *Jensen* line of cases placed beyond the reach of the States, and that the proviso conditioning recovery on the inapplicability of State law could not be read in a manner which would defeat the overall purpose of the Congress in adopting the law. The Court particularly stated that

> "(T)he field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from State compensation laws."[21]

The scope of the decision therefore, is readily recognizable. The Federal act is applicable to one engaged in maritime employment. It did not hold, as the Government argues,[22] "That Section 3(a) incorporates the line drawn in the *Jensen* case between admiralty and State jurisdiction but without an exception for matters of 'local concern' ". It held only that the scope of the proviso in Section 3(a) was not sufficient to place this par-

[20] Section 2(4) of the Act, 33 U.S.C. 902(4).
[21] 314 U.S. 244, 250.
[22] Government brief, p. 49.

ticular case beyond the coverage which the Congress intended to provide.

Likewise, *O'Rourke* gives no solace to the Government. In that case there was a conflict between the application of the Safety Appliance Act and the Harbor Workers' Act. No State compensation law was involved, for there was no question but that the State Act constitutionally could not be applied to a situation where a brakeman employed by an interstate rail carrier on a car ferry was injured. The Court simply held that as between the Federal Employers' Liability Act (which incorporated the Safety Appliance Act) and the Longshoremen's Act, the latter applied because the injured employee was engaged in a maritime occupation at the time he sustained his injury.

For the foregoing reasons, we submit that it is clear that the jurisdiction assumed by the Congress was that over longshoremen and harbor workers who, under the constitutional limitations placed upon the Congress by the Court in *Jensen* and subsequent cases, could not be covered by a State compensation law; that the Louisiana State Compensation Act particularly provides for the coverage of a new construction worker within its terms; and since such coverage has been affirmed as valid and proper in the face of conflicting interests vigorously arguing the question from both sides in the formative years of the jurisprudence on this subject, there can be no doubt but that the decision of the Court of Appeals below is correct and should be affirmed.

5.

The "Twilight Zone".

We must therefore now consider whether or not the "Twilight Zone" doctrine has effected a change in the

jurisprudence. We submit this doctrine is inapplicable to the facts present in this case, and that it does not and could not change the law in the instant situation.

The twilight zone doctrine stems from the Court's decision in *Davis v. Department of Labor*, 317 U.S. 249, where, in a case involving a close question of jurisdiction as between the Washington State Compensation Act and the Harbor Workers' Act, it was said that

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements."

From the foregoing quotation, the Government argues that this case is one falling within the so-called twilight zone, an argument which was unequivocally rejected by the Court of Appeals below for the reason that this case did not fall within the area of doubt which was the basis for the decision in *Davis*.

It is our submission that *Davis* did not change the law so as to give every amphibious worker alternative remedies under the State or Federal compensation systems. State acts are to be applied exclusively in fields where no doubt exists as to their application, and a State act is clearly applicable in those cases where a State compensation law cannot apply under *Jensen*. It is only in the limited gray field that the twilight zone is applicable. The doctrine does not purport to destroy the blacks and the whites. It simply recognizes the grays. It must be remembered in considering *Davis* that the decision was rendered within the framework of the *Jensen* rule and it must be limited to its facts.

It is to be understood that the unfortunate Mr. Davis met his death during the course of dismantling a bridge over a navigable stream in the State of Washington. He was a burner and was cutting steel in order that it could be properly transported on the barge on which he was working. The character of his work may have been purely local or it may not have been, depending on whether he was to be classified as a steel worker on a bridge or as a longshoreman loading steel on a barge. The application of the State law to a welder burning steel on a bridge dismantling job obviously could not affect interstate commerce to such an extent as to become burdensome to it. The work obviously was local in its nature, and certainly was not maritime employment. On the contrary, if Davis were to be considered as one engaged in the loading or stowing of scrap steel on a barge, he should be classified as a longshoreman and would fall directly within the very words of the Federal act insofar as a claim for injuries was concerned.

It is in this framework that we submit *Davis* was decided, and it is to this particular area that it should be limited. Your Honors did not purport to say, as the Government contends, that every industrial accident occurring on the navigable waters of the United States is covered by the Federal act; on the contrary, you said that under the facts of that case, a twilight zone existed in which "the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements" (317 U.S. 249, 256). The "theoretic illogic" of having a twilight zone exist between two mutually exclusive systems disappears if the decision is so interpreted. It should be limited to those cases where the proper remedy is in doubt, where factually a claimant's rights are uncertain. As in *Motor*

Boat Sales,[23] which foreshadowed *Davis*, Your Honors deliberately refrained from tampering with the constitutional issues raised by *Jensen* and deliberately refrained from attempting to review or limit the scope of the *Jensen* rule. This obviously must be a proper view, because even if the rule were changed insofar as the constitutional aspects are concerned, the statutory interpretation could not be changed, in the face of the clear and unequivocal words of the Act, wherein coverage is limited to those cases where State law cannot afford a remedy. In addition to overturning the Constitutional doctrine, the 40-year-old rule of *Rohde* would have to be changed, and Your Honors would have to hold that a State cannot afford a remedy to a new construction worker injured during the course of his employment.

The rule of *Moores*[24] and *Baskin*[25] may be difficult to reconcile with the foregoing theory. In the former case, the Massachusetts Compensation Law was applied to a worker who was injured when he slipped on a gun mount on a vessel in a floating dry dock. In the latter case the worker sustained his injuries while in the course of repairing a vessel afloat on the navigable waters and was at first denied but on remand was granted a compensation recovery under the State law.

Since both decisions of this Court were *per curiam*, it is impossible to know exactly what reasoning dictated the outcome. If, as Mr. Justice Qua of the Supreme Judicial Court of Massachusetts suggested,

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[23] "For under the holding of that case *(Jensen)*, even in the absence of any Congressional action, federal jurisdiction is exclusive and state action forbidden in an area, which, although of shadowy limits, doubtless embraces the case before us." (314 U.S. 244, 247)

[24] *Moores'* Case, 323 Mass. 162, 80 N.E. 2d 478. Aff. 335 U.S. 874.

[25] *Baskin v. Industrial Accident Commission*, 89 Cal. App. 2d 632, 201 P. 2d 549, reversed and remanded 338 U.S. 854. Opinion on remand 97 Cal. App. 2d 257, 217 P. 2d 733, aff. 340 U.S. 886.

> "the proper course is not to attempt to reason the matter through and to reconcile previous authority or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic' ",

then, we submit, the race is to be swiftest and justice will be meted out on a first-come, first-served basis. Such a situation would not seem to be in the best interests of sound administrative practice, and we respectfully submit that the treatment of *Moores* and *Baskin* should be that accorded these decisions by the Court of Appeals for the Fifth Circuit in its opinion below—namely, that they were not

> "intended to make everything a twilight zone merely because the injury occurred near the waterfront to anyone who worked in, on, over or around it."[26]

Moreover, if these decisions stand for what Mr. Justice Qua apparently believes them to stand for, a longshoreman injured aboard ship could now seek compensation under a State act, even though the doctrine of *Jensen* would hold such an act unconstitutional if it purported to grant a remedy to such an employee engaged in a maritime activity. The long standing important constitutional doctrine of the *Jensen* case, we submit, should not be so lightly overruled and reversed *sub silentio*.

In this connection, the Supreme Court of Louisiana, the highest court in that State, has held in *Ellis v. Travelers Insurance Co.*,[27] that a longshoreman injured on board ship was not within the twilight zone and that his sole remedy was under the Federal act. As the Court of Appeals for the Fifth Circuit stated in *Noah v.*

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[26] Opinion below, R. 48.
[27] 241 La. 433, 129 So. 2d 729.

Liberty Mutual Ins. Co.,[28] not even *Hahn v. Ross Island Sand & Gravel Co.*,[29] went so far as to take the drastic action of overruling the *Jensen* doctrine, even though it would have been very simple to do so in that case. On the contrary, as we read that decision, this Court there interpreted the twilight zone to be limited to those cases where it is impossible to predict in advance of trial whether an injury is compensable under a State or the Federal act. It did not intend to declare the entire area open to every worker around water.[30] *Jensen* has become one of our institutions; and "Institutions, like structures, are not sound because they are old—rather they are old because they are sound."

6.

The Election of Remedies.

The difficulty involved in this area is forcibly pointed up by the decision of the Court of Appeals for the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Hearne*,[31] where the court was confronted with a situation in which the Virginia Compensation Commission had granted a compensation award. In the face of this award, the Deputy Commissioner took jurisdiction over the claim and likewise granted an award, crediting thereon the amount paid by the employer on the State compensation claim. The decision held that the Virginia Compensation Commission had no jurisdiction, and ignored the fact that an award had been made by it on an application which was first in point of time. Such actions, we submit, tend to confuse rather than to ease

[28] 267 F. 2d 218.

[29] 358 U.S. 272.

[30] Cf. *Flowers v. Travelers Insurance Co.*, 258 F. 2d 220; *Noah v. Liberty Mutual Insurance Co.*, *supra*

[31] 192 F. 2d 968.

a difficult situation, and where a rule has been fashioned to simplify recovery, it will not do to tie employers and employees in a mass of technical difficulties which will continuously embroil the courts, particularly in the delicate field of State versus Federal authority.

In this case, the claimant voluntarily accepted State compensation for over two years before going to the Deputy Commissioner. No *res judicata* arises because no judgment or award is necessary under the Louisiana Compensation system, but the claimant nevertheless effectively elected his remedy if an opportunity for election existed. On what theory may he thereafter change his election? When is he bound? If the Deputy Commissioner refuses to grant an award after hearing the merits of his claim, may a claimant disregard that action and go back to the State Court for renewed relief under the State law? Why should this type of claimant be given two bites at the cherry in this field when an election of remedies is binding in others?

All of these queries, we submit, are apposite to show the fallacy of any theory that alternative remedial action is always available. Even in the twilight zone, there must be an end to judicial and administrative proceedings, and if the claimant here ever had any justiciable claim under the Federal Act, it has been foreclosed by his two year acceptance of benefits under the Louisiana State Act.

CONCLUSION

For the reasons set forth in the able opinion of the Court of Appeals below and for the additional reasons

set forth herein, we respectfully submit that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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